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2013 MAY 29 AM 10: 11

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

2013 MAY 28 PM 4: 44

FIRST GENERAL COUNSEL'S REPORT

CELA

MUR: 6649

DATE COMPLAINT FILED: Sept. 10, 2012

SUPPLEMENTAL COMPLAINT: Sept. 20, 2012

DATE OF NOTIFICATION: Sept. 25, 2012

LAST RESPONSE RECEIVED: Dec. 3, 2012

DATE ACTIVATED: March 29, 2013

EXPIRATION OF SOL: Earliest: Aug. 13, 2017

Latest: Aug. 28, 2017

COMPLAINANT:

Kevin Izzo

RESPONDENT:

Republican State Committee of Delaware and
William E. Smith in his official capacity as
treasurer¹

RELEVANT STATUTES AND
REGULATIONS:

2 U.S.C. § 441d(a)
11 C.F.R. § 100.26

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

Complainant alleges that the Republican State Committee of Delaware ("Committee") distributed "public communications" regarding Rose Izzo, a candidate in the 2012 Republican primary for Delaware's sole seat in the House of Representatives, without including a required disclaimer. We recommend that the Commission exercise its prosecutorial discretion and dismiss the allegation that the Committee violated 2 U.S.C. § 441d(a) by failing to place a disclaimer on the communication because, given the *de minimus* costs of producing it, and the

¹ William E. Smith replaced John Fluharty as treasurer of the Republican State Committee of Delaware on February 19, 2013.

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1 apparent limited number of copies of the communication distributed, it is not a worthwhile use of
2 the Commission's resources to conduct an investigation or pursue this matter to conciliation. *See*
3 *Heckler v. Cheney*, 470 U.S. 821 (1985). We also recommend that the Commission close the
4 file.

5 II. FACTUAL AND LEGAL ANALYSIS

6 A. Facts

7 Complainant alleges that the Committee, through its executive director John Fluharty,
8 distributed "public communications" in the form of a nine-page compilation of materials that
9 "clearly identified" candidate Rose Izzo and detailed her previous affiliation with the Democratic
10 Party, but did not include a disclaimer.² Compl. at 1 (Sept. 10, 2012). The referenced
11 communication (or "packet") includes: excerpts from Izzo's campaign materials from previous
12 elections when she ran as a Democrat; photographs of her with prominent Democrats; news
13 articles referencing her status as a Democratic candidate; and a timeline of Izzo's elections in
14 Pennsylvania and Delaware, including the office pursued, the outcome of the election, and her
15 party affiliation. *See id.*, Attach. 1. Each page is annotated with comments questioning Izzo's
16 Republican credentials. *Id.* Complainant alleges that the packet was "passed out either by
17 electronic means, by mail distribution or by handing out at meetings in the state of Delaware."
18 Supp. Compl. at 1 (Sept. 20, 2012). He asserts that more than 100 people attended some of the
19 meetings.³ *Id.*

² The Response describes the packet as containing eight pages. *See* Resp. at 1, 2 (Nov. 28, 2012). We believe, however, that the packet contains nine pages. *See* Compl., Attach. 1.

³ The Complaint was filed in two parts: the first, filed September 10, 2012 ("Compl."), attached the nine-page packet, and the second, filed September 20, 2012 ("Supp. Compl."), attached an e-mail forwarding the same packet, a print-out from a blog post reprinting a posting from a website, and a news article.

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1 The Complainant also provided an e-mail dated August 17, 2012, which was forwarded
2 to the Izzo campaign. The e-mail from "Concerned Conservative" attached the packet and states,
3 "I recently attended a meeting and saw some information (attached) that deeply concerned me,"
4 and then goes on to voice concerns about Izzo's past activities as a Democrat. Supp. Compl.,
5 Attach. The forwarding e-mail dated August 18, 2012, notes that, "Somebody else (concerned
6 conservative-whomever that is) was also at the monday [sic] mtg. and got the same packet I picked
7 up." *Id.* In addition, the Complainant provided a copy of a posting from a blog called "Resolute
8 Determination," on which appeared an excerpt from a website called wipeupthamess.com. The
9 posting, written by "C.R.," reportedly reprints "an email from our inbox" and comments that it
10 "[d]oesn't seem like the Izzos are as innocent as they claim." *Id.* The e-mail advises voters to
11 ask Izzo and her husband a series of questions about their backgrounds prior to voting, including
12 her past affiliation as a Democrat, and ends with, "[f]orward this to your Republican friends so
13 they know the truth about Rose Izzo." *Id.*⁴

14 In its Response, the Committee states that John Fluharty disbursed
15 5-10 copies [of the packet] at a meeting, but that was all. What those folks
16 who received the information may have done with it is unknown ... but
17 there was simply no mass distribution by the [Committee] of any kind.
18 Other than a handful of copies at one meeting, nothing was distributed by
19 the [Committee].
20
21 Resp. at 1. Additionally, the Committee asserts that, "[a]ny suggestion that the [Committee] was
22 actively distributing the packet whether by mail, electronic means, or otherwise, is simply
23 untrue." *Id.* The Response points out that the e-mail to the Izzo campaign with the packet
24 attached was not sent by the Committee but rather by an individual (apparently a reference to

⁴ The Complainant also provides a news article dated September 4, 2012, that recounts the filing of the Complaint in this matter, contains a description of some of the information about the Izzos appearing on the wipeupthamess.com website, and a denial from Izzo's opponent in the election that he had anything to do with the website. Supp. Compl., Attach.

1 "Concerned Conservative"), and so the e-mail does not constitute evidence that the Committee
2 distributed the packet through electronic means. *Id.* at 2. With respect to the blog posting
3 providing an excerpt from the www.wipeupthemess.com website, the Response denies that the
4 Committee had anything to do with the website or any e-mails touting it. *Id.* It further notes that
5 these materials do not mention any packet akin to the one distributed by the Committee. *Id.*
6 Finally, the Response contends that the Complaint is deficient because the packet does not fall
7 within the Commission's definition of "public communication" at 11 C.F.R. § 100.26. *Id.*

8 **B. Legal Analysis**

9 The Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission
10 regulations require that all public communications paid for by a candidate or a political
11 committee, and all Internet websites of a political committee, must contain a disclaimer clearly
12 stating that the political committee has paid for it. 2 U.S.C. § 441d(a), 11 C.F.R. § 110.11(a)(1)
13 and (b). A "public communication" is "a communication by means of any broadcast, cable, or
14 satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or
15 telephone bank to the general public, or any other form of general public political advertising."
16 2 U.S.C. § 431(22); *see also* 11 C.F.R. § 100.26.

17 If the packet falls within the definition of a "public communication" as "any other form
18 of general public political advertising," it would require a disclaimer.⁵ *See* 11 C.F.R.
19 § 110.11(a)(1). The packet may constitute general public political advertising in the form of a
20 handbill. A "handbill," although not defined by statute or regulation, is commonly understood to
21 be a "printed sheet or pamphlet distributed by hand." *The American Heritage Dictionary of the*

⁵ The packet clearly does not fall into one of the other types of communications specifically listed in the definition of public communication. *See* 2 U.S.C. § 431(22); 11 C.F.R. § 100.26.

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1 *English Language* (4th ed. 2011). The Committee asserts that Fluharty distributed only five to
2 ten copies of the packet at one meeting. The Complainant, however, who does not state that he
3 was at the meeting in question, asserts that the packet could have been distributed in a number of
4 ways, including electronically and by mail. The e-mail forwarding the packet to the Izzo
5 committee includes the following: "Somebody else (concerned conservative-whomever that is)
6 was also at the monday [sic] mtg. and got the same packet I picked up." Supp. Compl. Attach.
7 The reference to "picked up" might mean that Fluharty placed the packets somewhere in the
8 meeting room and invited attendees to look at them or take one, rather than distributing them by
9 hand, which might affect its status as a handbill.⁶

10 It appears that the packet was distributed beyond the five to ten copies the Committee
11 purports to have distributed at the meeting. Complainant presents information showing that the
12 packet was distributed as an attachment to an August 17, 2012, email from "Concerned
13 Conservative" and provides a posting from the Resolute Determination blog that purports to
14 show that the poster also received the packet electronically. Suppl. Comp. at 3. This blog
15 posting also references a website, www.wipeupthemess.com, that contains "Questions for Rose

⁶ Even if there were evidence as to the method of distribution, the Commission has disagreed on whether handbills constitute "public communications" for the purposes of the disclaimer requirements. In MUR 5604 (Mason), the Commission found that a handbill that fulfilled the criteria for the volunteer materials exemption (or "coattails exemption") was not, by definition, a public communication. There were two separate rationales supporting this conclusion. Three Commissioners reasoned that *all* handbills fell outside of the definition of "public communication" (and thus those that qualify for the coattails exemption necessarily fall outside of the definition), while three Commissioners more narrowly reasoned that only those public communications that qualified for the coattails exemption were not "public communications." Compare Statement of Reasons, Comm'rs Toner, Mason, and von Spakovsky at 4-5, MUR 5604 (Mason) with Statement of Reasons, Comm'rs Lenhard, Walther, and Weintraub at 3-4, MUR 5604 (Mason). In this matter, Fluharty was being paid a salary by the Committee when he distributed the packet and, thus, the packet would not qualify for the volunteer materials activity exemption at 11 C.F.R. § 100.87. See <http://images.niotusa.com/pdf/018/12952934018/12952934018.pdf#navpanes=0>.

1 Izzo" that ask about her schooling, work history, her husband, a court case, and her voting
2 history.⁷ *Id.*

3 The Committee denies sending the "Concerned Conservative" e-mail or having anything
4 to do with the website or any e-mails touting it.⁸ While not explicitly denying involvement with
5 the Resolute Determination blog, the Committee alleges that the blog and the packet are
6 unrelated, pointing out that the blog's content (the excerpt from the wipeupthemess.com website)
7 does not reference receipt of the packet and appears to ask various questions that were not
8 mentioned in the packet.

9 Under these circumstances, we conclude that the Commission need not address the
10 underlying issue of whether the communication was a "public communication" requiring a
11 disclaimer given that (1) the Committee acknowledges distributing the packet but asserts it
12 distributed only a very limited number at one meeting; (2) anyone who saw or received the
13 packet at the meeting knew the Committee was responsible for the packet; (3) the information
14 we have at this time does not give rise to a reasonable inference that the Committee was
15 responsible for any distribution that occurred outside of the meeting or that such distribution was
16 more than minimal; and (4) the costs of annotating the pages and photocopying and assembling
17 them into a packet would appear to be *de minimis*; we did not locate any costs on the
18 Committee's disclosure reports that appeared to be related to the packet. *See Factual & Legal*

⁷ We note that the same Complainant filed a separate complaint against the website for not containing a disclaimer, and, in an amended complaint dated December 5, 2012, alleged that the campaign of Izzo's opponent, Tom Kovach, was behind that website, not the Committee. *See* Amend. Compl. (Dec. 5, 2012), MUR 6637 (www.wipeupthemess.com). MUR 6637 is being handled separately as an EPS dismissal case.

⁸ The Complainant has presented no evidence to support his allegations that the Committee was involved in the e-mail, the website, and the blog posting. Nor has the Complainant presented evidence indicating that the Committee paid a fee to place the communications so that they became "public communications" requiring disclaimers. *See* 11 C.F.R. § 100.26 ("The term *general public political advertising* shall not include communications over the Internet, except for communications placed for a fee on another person's Web site.").

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1 Analysis, at 2, MUR 6256 (Michael Babich) (Commission dismissed the allegation that a leaflet
2 did not contain an appropriate disclaimer based on limited distribution and low production cost);
3 First Gen. Counsel's Rpt. at 3-4 and Certification, MUR 6205 (Fort Bend Democrats)
4 (Commission dismissed the allegation that Committee triggered the political committee threshold
5 in distributing a door hanger based on the modest amount of money involved).⁹

6 Accordingly, we recommend that the Commission dismiss the allegation that the
7 Committee violated 2 U.S.C. § 441d(a) by failing to include a disclaimer on a packet of
8 annotated photocopied pages, and close the file. *See Heckler v. Cheney*, 470 U.S. 821 (1985).

9 **III. RECOMMENDATIONS**

- 10 1. Dismiss as a matter of prosecutorial discretion the allegation that Republican
11 State Committee of Delaware and William E. Smith in his official capacity as
12 treasurer violated 2 U.S.C. § 441d(a) by not placing a disclaimer on a packet of
13 annotated photocopied pages.
14
15 2. Approve the attached Factual and Legal Analysis.

⁹ Complainant also alleges that the packet required a disclaimer because it was an "electioneering communication." Compl. at 1. Since the packet was not a broadcast, cable, or satellite communication, however, it does not fit within the definition of "electioneering communication." *See* 11 C.F.R. § 100.29; *see also* Resp. at 2.

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3. Approve the appropriate letters.


4. Close the file.


Anthony Herman
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5-28-13
Date

BY:


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